

HOUSE BILL 3064
By Harwell

AN ACT to amend Tennessee Code Annotated, Title 68, Chapter 11, relative to electronic monitoring devices in the rooms of patients of convalescent or nursing homes or related institutions.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Title 68, Chapter 11, is amended by adding Sections 2 through 13 of this act as a new Part 17.

SECTION 2. As used in this act, unless the context otherwise requires:

(1) "Authorized electronic monitoring" means the placement of an electronic monitoring device in the room of a patient of an institution and making tapes or recordings with the device after making a request to the institution to allow electronic monitoring.

(2) "Electronic monitoring device":

(A) Includes:

(i) Video surveillance cameras installed in the room of a patient; and

(ii) Audio devices installed in the room of a patient designed to acquire communications or other sounds occurring in the room; and

(B) Does not include an electronic, mechanical, or other device that is specifically used for the nonconsensual interception of wire or electronic communications.

(3) "Institution" means "nursing home" as this term is defined in § 68-11-201(29).

SECTION 3.

(a) It is a defense to prosecution under Title 39, Chapter 13, Part 6, Title 40, Chapter 6, Part 3, or any other statute of this state under which it is an offense to intercept a communication or disclose or use an intercepted communication, that the communication was intercepted by an electronic monitoring device placed in the room of a patient of an institution.

(b)

(1) Nothing in this act shall be construed to permit the use of a tape or recording made by an electronic monitoring device authorized under this act in any civil action except a court action or administrative proceeding concerning a report of abuse or neglect pursuant to the provisions of Sections 9 and 10 of this act.

(2) Provided, however, nothing in this act shall be construed to or affect a person's right to bring a civil action for damages for invasion of privacy under Title 68, Chapter 11, Part 15, or any other provision of law.

(c) A communication or other sound acquired by an audio electronic monitoring device installed under the provisions of this act concerning authorized electronic monitoring is not considered to be a communication or oral communication under Title 39, Chapter 13, Part 6 or Title 40, Chapter 6, Part 3.

SECTION 4.

(a) For purposes of this act, the placement and use of an electronic monitoring device in the room of a patient is considered to be covert if:

(1) The placement and use of the device is not open and obvious; and

(2) The institution and the department are not informed about the device by the patient, by a person who placed the device in the room, or by a person who is using the device.

(b) The department and the institution may not be held to be civilly liable in connection with the covert placement or use of an electronic monitoring device in the room of a patient.

SECTION 5. The department by rule shall prescribe a form that must be completed and signed on a patient's admission to an institution by or on behalf of the patient. The form must state:

(1) That a person who places an electronic monitoring device in the room of a patient or who uses or discloses a tape or other recording made by the device may be civilly liable for any unlawful violation of the privacy rights of another;

(2) That a person who covertly places an electronic monitoring device in the room of a patient or who consents to or acquiesces in the covert placement of the device in the room of a patient has waived any privacy right the person may have had in connection with images or sounds that may be acquired by the device;

(3) That a patient or the patient's guardian or legal representative is entitled to conduct authorized electronic monitoring under this act, and that if the institution refuses to permit the electronic monitoring or fails to make reasonable physical accommodations for the authorized electronic monitoring that the person should contact the Tennessee department of health;

(4) The basic procedures that must be followed to request authorized electronic monitoring;

(5) The manner in which this act affects the legal requirement to report abuse or neglect when electronic monitoring is being conducted; and

(6) Any other information regarding covert or authorized electronic monitoring that the department considers advisable to include on the form.

SECTION 6.

(a) If a patient has capacity to request electronic monitoring and has not been judicially declared to lack the required capacity, only the patient may request authorized electronic monitoring under this act, notwithstanding the terms of any durable power of attorney or similar instrument.

(b) If a patient has been judicially declared to lack the capacity required for taking an action such as requesting electronic monitoring, only the guardian of the patient may request electronic monitoring under this act.

(c) If a patient does not have capacity to request electronic monitoring but has not been judicially declared to lack the required capacity, only the legal representative of the patient may request electronic monitoring under this act.

The department by rule shall prescribe:

(1) Guidelines that will assist institutions, family members of patients, advocates for patients, and other interested persons to determine when a patient lacks the required capacity; and

(2) Who may be considered to be a patient's legal representative for purposes of this act, including:

(A) Persons who may be considered the legal representative under the terms of an instrument executed by the patient when the patient had capacity; and

(B) Persons who may become the legal representative for the limited purpose of this act under a procedure prescribed by the department.

SECTION 7.

(a) A patient or the guardian or legal representative of a patient who wishes to conduct authorized electronic monitoring must make the request to the institution on a form prescribed by the department.

(b) The form prescribed by the department must require the patient or the patient's guardian or legal representative to:

(1) Release the institution from any civil liability for a violation of the patient's privacy rights in connection with the use of the electronic monitoring device;

(2) Choose, when the electronic monitoring device is a video surveillance camera, whether the camera will always be unobstructed or whether the camera

should be obstructed in specified circumstances to protect the dignity of the patient; and

(3) Obtain the consent of other patients in the room, using a form prescribed for this purpose by the department, if the patient resides in a multiperson room.

(c) Consent under subsection (b)(3) may be given only:

(1) By the other patient or patients in the room;

(2) By the guardian of a person described by subdivision (1), if the person has been judicially declared to lack the required capacity; or

(3) By the legal representative who under Section 6, subsection(c) may request electronic monitoring on behalf of a person described by subdivision (1), if the person does not have capacity to sign the form but has not been judicially declared to lack the required capacity.

(d) The form prescribed by the department under subsection (b)(3) must condition the consent of another patient in the room on the other patient also releasing the institution from any civil liability for a violation of the person's privacy rights in connection with the use of the electronic monitoring device.

(e) Another patient in the room may:

(1) When the proposed electronic monitoring device is a video surveillance camera, condition consent on the camera being pointed away from the consenting patient; and

(2) Condition consent on the use of an audio electronic monitoring device being limited or prohibited.

(f) If authorized electronic monitoring is being conducted in the room of a patient and another patient is moved into the room who has not yet consented to the electronic monitoring, authorized electronic monitoring must cease until the new patient has consented in accordance with this section.

(g) The department may include other information that the department considers to be appropriate on either of the forms that the department is required to prescribe under this section.

(h) The department may adopt rules prescribing the place or places that a form signed under this section must be maintained and the period for which it must be maintained.

(i) Authorized electronic monitoring:

(1) May not commence until all request and consent forms required by this section have been completed and returned to the institution; and

(2) Must be conducted in accordance with any limitation placed on the monitoring as a condition of the consent given by or on behalf of another patient in the room.

SECTION 8.

(a) An institution shall permit a patient or the patient's guardian or legal representative to monitor the room of the patient through the use of electronic monitoring devices.

(b) The institution shall require a patient who conducts authorized electronic monitoring or the patient's guardian or legal representative to post and maintain a conspicuous notice at the entrance to the patient's room. The notice must state that the room is being monitored by an electronic monitoring device.

(c) Authorized electronic monitoring conducted under this act is not compulsory and may be conducted only at the request of the patient or the patient's guardian or legal representative.

(d) An institution may not refuse to admit an individual to residency in the institution and may not remove a patient from the institution because of a request to conduct authorized electronic monitoring. An institution may not remove a patient from the institution because covert electronic monitoring is being conducted by or on behalf of a patient.

(e) An institution shall make reasonable physical accommodation for authorized electronic monitoring, including:

(1) Providing a reasonably secure place to mount the video surveillance camera or other electronic monitoring device; and

(2) Providing access to power sources for the video surveillance camera or other electronic monitoring device.

(f) The patient or the patient's guardian or legal representative must pay for all costs associated with conducting electronic monitoring, other than the costs of electricity.

The patient or the patient's guardian or legal representative is responsible for:

(1) All costs associated with installation of equipment; and

(2) Maintaining the equipment.

(g) An institution may require an electronic monitoring device to be installed in a manner that is safe for patients, employees, or visitors who may be moving about the room. The department may adopt rules regarding the safe placement of an electronic monitoring device.

(h) If authorized electronic monitoring is conducted, the institution may require the patient or the patient's guardian or legal representative to conduct the electronic monitoring in plain view.

(i) An institution may but is not required to place a patient in a different room to accommodate a request to conduct authorized electronic monitoring.

SECTION 9.

(a) For purposes of the duty to report abuse or neglect under Title 71, Chapter 6, Part 1, a person is required to report abuse or neglect based on the person's viewing of or listening to a tape or recording only if the incident of abuse is acquired on the tape or recording and only if it is clear from viewing or listening to the tape or recording that abuse or neglect has occurred.

(b) If abuse or neglect of the patient is reported to the institution and the institution requests a copy of any relevant tape or recording made by an electronic

monitoring device, the person who possesses the tape or recording shall provide the institution with a copy at the institution's expense.

SECTION 10.

(a) Subject to applicable rules of evidence and procedure and the requirements of this section, a tape or recording created through the use of covert or authorized electronic monitoring described by this act may be admitted into evidence in a court action or administrative proceeding concerning a report of adult abuse and neglect pursuant to Title 71, Chapter 6, Part 1.

(b) A court or administrative agency may not admit into evidence a tape or recording created through the use of covert or authorized electronic monitoring or take or authorize action based on the tape or recording unless:

(1) If the tape or recording is a video tape or recording, the tape or recording shows the time and date that the events acquired on the tape or recording occurred;

(2) The contents of the tape or recording have not been edited or artificially enhanced; and

(3) If the contents of the tape or recording have been transferred from the original format to another technological format, the transfer was done by a qualified professional and the contents of the tape or recording were not altered.

(c) A person who sends more than one tape or recording to the department shall identify for the department each tape or recording on which the person believes that an incident of abuse or evidence of neglect may be found. The department may adopt rules encouraging persons who send a tape or recording to the department to identify the place on the tape or recording that an incident of abuse or evidence of neglect may be found.

SECTION 11. Each institution shall post a notice at the entrance to the institution stating that the rooms of some patients may be being monitored electronically by or on behalf of the patients and that the monitoring is not necessarily open and obvious. The department by rule shall prescribe the format and the precise content of the notice.

SECTION 12.

(a) The department may impose appropriate sanctions under this chapter on an administrator of an institution who knowingly:

- (1) Refuses to permit a patient or the patient's guardian or legal representative to conduct authorized electronic monitoring;
- (2) Refuses to admit an individual to residency or allows the removal of a patient from the institution because of a request to conduct authorized electronic monitoring;
- (3) Allows the removal of a patient from the institution because covert electronic monitoring is being conducted by or on behalf of the patient; or
- (4) Violates another provision of this act.

(b) The department may assess an administrative penalty under the provisions of Title 68, Chapter 11, Part 8 against an institution that:

- (1) Refuses to permit a patient or the patient's guardian or legal representative to conduct authorized electronic monitoring;
- (2) Refuses to admit an individual to residency or allows the removal of a patient from the institution because of a request to conduct authorized electronic monitoring;
- (3) Allows the removal of a patient from the institution because covert electronic monitoring is being conducted by or on behalf of the patient; or
- (4) Violates another provision of this act.

SECTION 13.

(a) A person who intentionally hampers, obstructs, tampers with, or destroys an electronic monitoring device installed in a patient's room in accordance with this act or a tape or recording made by the device commits an offense. An offense under this section is a Class B misdemeanor.

(b) It is a defense to prosecution under Subsection (a) that the person took the action with the effective consent of the patient on whose behalf the electronic monitoring device was installed or the patient's guardian or legal representative.

SECTION 14. Tennessee Code Annotated, Section 68-11-901, is amended by adding the following language as a new item to be appropriately designated:

() To place in the patient's room an electronic monitoring device that is owned and operated by the patient or provided by the patient's guardian or legal representative;

SECTION 15. This act shall take effect July 1, 2004, the public welfare requiring it